Filed 5/18/10 Marquez v. Superior Court CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL MARQUEZ, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; ESTATE OF PABLO GARCIA, et al., Real Parties in Interest.	No. B221965 (Super. Ct. No. NC052832)

ORIGINAL PROCEEDINGS; application for a writ of mandate. Joseph E. DiLoreto, Judge. Petition for writ of mandate granted.

Gordon & Rees, James J. McMullen, Jr. and Theresa A. Kristovich for Petitioner.

No appearance for Respondent.

Dell'Ario & LeBoeuf, Alan Charles Dell'Ario and Jacques LeBoeuf; Panish Shea & Boyle, Brian Panish, Kevin Boyle and Rahul Ravipudi for Real Parties in Interest.

SUMMARY

In this wrongful death action, the plaintiffs allege the defendant employee operated a forklift while under the influence of alcohol, killing the decedent as a result. The plaintiffs further allege the defendant had a history of coming to work under the influence, and his employer knew or should have known he was not fit to operate a forklift safely. The defendant's urine sample, provided on the night of the incident, tested positive for alcohol. The defendant later sought treatment at the Betty Ford Center.

The plaintiffs then subpoenaed the defendant's medical and psychiatric records from the Betty Ford Center and sought to depose the person most qualified regarding the defendant's treatment there. The Center responded that, as a drug and alcohol treatment program governed by federal laws and regulations addressing the confidentiality of such records, it would be unable to comply with the request for information, and the defendant moved to quash the subpoenas. After an in camera inspection, the trial court ordered disclosure of the defendant's intake information regarding his prior history as well as the deposition of the case worker who had received this information from the defendant. We grant the defendant's petition for writ of mandate seeking to vacate this order.

FACTUAL AND PROCEDURAL BACKGROUND

On January 28, 2009, Pablo Garcia was killed when he was struck by a forklift Michael Marquez was operating in the course of his employment with SSA Terminals in Long Beach. In April, Garcia's Estate sued Marquez (and his employer SSA Terminals among others not parties to this writ proceeding) for wrongful death, asserting a negligence cause of action as to all defendants and negligent hiring, retention, supervision and training as to Marquez's employer.[1] According to the (first amended) complaint filed by Garcia's Estate, Marquez operated the forklift negligently, recklessly and while

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[1] Garcia's wife Eva Nidia Aguirre, is his successor-in-interest, and she is proceeding on her own behalf and on behalf of minors Anthony Junior Garcia, Nidia Garcia and Pablo Leonel Garcia.

under the influence of alcohol. The Estate further alleged Marquez "had a history of showing up at the Terminal while under the influence of alcohol and other controlled substances," and his supervisors knew of Marquez's practice but continued to allow him to operate heavy machinery in such a condition. The Estate amended its complaint to seek punitive damages based on these allegations.[2]

In October, a criminal complaint was filed against Marquez, charging him with "vehicular manslaughter without gross negligence" in violation of Penal Code section 191.5, subdivision (b). Shortly thereafter, trial was set in this civil case.[3]

Later that month, the Estate issued a subpoena for business records seeking Marquez's "medical" and "psychiatric" records from the Betty Ford Center.[4] In

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[2] According to Marquez's employer, Marquez said he had not seen Garcia. At his employer's request, Marquez was drug-tested on the night of the incident. According to the Medical Review Officer's Drug Test Results, Marquez's urine tested positive for alcohol (0.17 g/dl) nearly three hours after the incident occurred.

According to the February 9, 2009, Minutes of Special Meeting of the Joint Longshore Labor Relations Committee for the Los Angeles-Long Beach Harbor, Marquez did not appear at the meeting because, according to his union, he had "checked into a drug and alcohol clinic." According to the June 26, 2009, Minutes of Special Meeting of the Joint Longshore Labor Relations Committee, regarding SSA's complaint against Marquez for "INTOXICATION/DRUG/ALCOHOL POLICY VIOLATION/DISREGARD OF EMPLOYER'S INTEREST," Marquez provided documents verifying he had completed an "in-treatment D/A program and is currently enrolled in an out-treatment program."

[3] After the trial court granted the Estate's motion for preference, Marquez's request to stay this matter pending resolution of the criminal case was denied, and we denied Marquez's subsequent petition for writ of mandate in connection with that ruling (B221769).

[4] More particularly, the Garcia Estate sought the following records pertaining to Marquez from the Betty Ford Center:

"All documents & original radiological films, including but not limited to x-ray films, MRIs, CT scans, relating to patient's medical/dental histories; complaints;

response, the Manager for Health Information Management at the Betty Ford Center (Teresa A. Costa, CMT, RHIT) sent a letter to counsel for the Estate, indicating the Center was "unable" to comply with the request for records or even acknowledge whether Marquez had ever been a patient. "Betty Ford Center is a drug and alcohol treatment program and is governed by federal laws and regulations that address the confidentiality of alcohol and drug abuse patient records. . . . See 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2. [¶] The federal confidentiality laws and regulations, as well as the HIPAA privacy regulations, prohibit release of information about current or former patients without written patient authorization in a form specified in the regulations. See 42 C.F.R. § 2.31 and 45 C.F.R. 164.508. . . ."

"Furthermore, the federal confidentiality laws and regulations prohibit a program from disclosing information in response to a subpoena unless the court also issues an order in compliance with the procedures and standards set forth in 42 C.F.R. Part 2, Subpart E. Before the court may issue such an order, both the program and the alleged patient must be notified of the proceedings and given an opportunity to appear in person or file a responsive statement. 42 C.F.R. § 2.64(b). After the program is given an opportunity to be heard on whether to disclose the information, the court must find that 'good cause' exists to issue the order. 42 C.F.R. § 2.64(d).

"To make this determination the court must find that (1) other ways of obtaining the information are not available or would not be effective; and (2) the public interest and

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symptoms; examinations; findings; diagnosis; prognosis; sign-in sheets; photographs; video[]tapes; treatment; physical therapy; billing records and records of payments; including without limiting the generality of the foregoing, all correspondence including but not limited to other written or graphic material.

"All psychiatric records including but not limited to all correspondence and other written or graphic material relating to the physical or mental condition of said individual. It is alleged that injuries have been sustained to the health and nervous system and have caused/cause great mental, physical, and nervous pain and suffering.

"*Include billing records*"

need for disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services. 42 C.F.R. § 2.64(d). . . .

"Federal law preempts state-mandated disclosure of records where the state-mandated disclosure does not employ the procedures outlined in 42 C.F.R. Part 2. More specifically, 42 C.F.R. § 2.20 provides:

"[']The statutes authorizing those regulations do not preempt the field of law that they cover to exclusion of all State laws in that field. If a disclosure permitted under these regulations is prohibited under State law, neither these regulations nor the authorizing statutes may be construed to authorize any violation of that State law. However, no State law may either authorize or compel any disclosure prohibited by these regulations.'. . ."

Shortly thereafter, Marquez filed a motion to quash the deposition subpoena for production of business records served on the Betty Ford Center, arguing the subpoena was defective, the documents sought were not relevant, production of the records would violate his constitutional right of privacy and no court order had been issued as required for the disclosure of records from a drug and alcohol program governed by federal laws and regulations, citing the authorities referenced in the Betty Ford Center's letter.

In opposing the motion to quash, the Estate acknowledged, "Federal laws govern the disclosure of patient records from drug and alcohol treatment programs," and "42 C.F.R. Part 2, § 2.64 [cited in the Center's letter refusing to produce the records] sets forth the procedures and criteria for orders authorizing disclosures for non-criminal purposes," but the regulations "do not trump State law. [U]nder the federal regulations and California law, [the Estate is] entitled to discover Mr. Marquez's records from the Betty Ford Center as they are highly relevant and probative of his intoxication at the time of causing the death of Pablo Garcia." Citing the declaration of its toxicologist (Herbert

Moskowitz), the Estate argued drug and alcohol treatment programs "typically" conduct a drug and alcohol test upon admission.[5]

According to Moskowitz, such information would refute Marquez's contention that he was not intoxicated at the time of the incident and that the urine testing was flawed. Such records are "likely to discuss any history of alcoholism, drinking pattern, and consumption of alcohol leading up the date in question," in order to challenge Marquez's claim he did not "appear intoxicated" at the time, and "[m]ost importantly" will likely include "party admissions" as to Marquez's consumption of alcohol leading up to the incident. Moskowitz could think of no other way to obtain this information apart from Betty Ford Center records.

According to the OSHA investigator's Documentation Worksheet, the Estate argued, "It is common knowledge that there is a problem with drugs/alcohol at the terminal."[6] Finally, the Estate argued, documentation of any history of alcoholism and on-the-job drinking would be relevant to its punitive damage claim against Marquez's employer. Betty Ford Center records "may reveal that Marquez had a long history of alcoholism, and that he regularly drank while working at SSA, and in fact was known to accept six-packs of beer in return for priority treatment from other longshoremen and teamsters alike."

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[5] In his reply, Marquez asserted he was not "whisked away" to the Betty Ford Center immediately following the incident as the Estate suggested (based on his unavailability for an interview noted in the OSHA report), but rather was admitted to the Center "a full week" after the accident. At the hearing on the motion, after counsel for the Estate said Marquez had "immediately" gone to the Betty Ford Center, Marquez's counsel also represented to the court (without challenge) that counsel had "obviously misspoke[n]" as Marquez had not gone to the Betty Ford Center until "a week" later.

[6] According to the OSHA report, "It is common knowledge that there is a problem with drugs/alcohol at the terminal. The supervisor could have known with due diligence to look for evidence of intoxication as outlined in the IIPP, PMA rule 605, and through his PMA drug/alcohol training on recognizing someone under the influence."

At the December 24, 2009, hearing on the motion to quash, counsel for the Estate said the "Betty Ford records contain critical evidence regarding [Marquez's] drinking history patterns, on the punitive damage claim against him under *Ta*[*y*]*lor v. Superior Court* [(1979) 24 Cal.3d 890]." The trial court responded that the Estate could obtain "other evidence" of Marquez's history "just by talking to coworkers." Counsel for the Garcia Estate acknowledged, "Marquez . . . did give the police officer statements at the scene and made other statements," but Marquez's statements at Betty Ford were "clearly . . . admissible non-hearsay" as to the nature and extent of his drinking history.

The trial court then denied Marquez's motion to quash, ordering the records to be "produced to this court under seal and the court will conduct a 402 hearing to determine whether or not there's anything relevant to the issues in this case before the records are released to the plaintiffs." Later, the court stated it would determine "whether or not there's anything that should be relevant with respect to issues of punitive damages in this case." In this regard, counsel for the Estate informed the trial court, "[W]e've been able to get witnesses from the union, not only about the alcohol being handed out on the job, but Mr. Marquez drinking on the job from a flask, driving around, knowledge of it by defendant [employer]."

Thereafter, the Estate served a notice of deposition of the Betty Ford Center's person most qualified and request for documents relating to Marquez, including his treatment, interviews and patient history, statements regarding the date of the incident, diagnosis and prognosis. Marquez filed an ex parte application seeking to quash the deposition subpoena.

At a subsequent hearing on January 25, 2010, to address this and other ex parte matters, the court deferred the matter for two days to be heard along with the court's in camera review of the records from the Betty Ford Center. At that time, counsel for the Estate told the court witnesses to the incident had "already testified they smelled alcohol on [Marquez's] breath," and the Estate was permitted to depose Marquez's coworkers, family members and friends.

At the January 27 hearing which is the subject of these writ proceedings, the trial court first stated that it had received and reviewed the "treatment records and I guess medical records of Mr. Marquez. The court has reviewed the entire file and has taken from that the records which are germane to the issues in this case only. [¶] And the court will authorize the release of those records [to the attorneys of record only, with no copies to be made or disseminated, and to be returned under seal to the court and then the Betty Ford Center at the conclusion of the case]. Concerning the matter of depositions, the court will not authorize the depositions of any of the treating physicians on the basis that any information they have was for the purpose of treatment only and not germane to the issues in this case. However, the court will allow one deposition and that deposition may be taken of . . . Steve Smith."

"Basically the records that the court is releasing are only the records of the information given by Mr. Marquez to the case worker who basically took the basic information about his history and about his prior drinking record only. The other records that are not being released are, first of all, any of the doctors[']s notes, the nurses[']s notes, any of the medical treating personnel who prescribed various forms of treatment, issued/administered drugs, etc., all directly related to his treatment and not related to his case history.

"*The only reason I'm releasing the ones involved is because they relate to information provided about his prior drinking history and the information which may or may not have been known by the employer at the time that he was referred to the [C]enter*." (Italics added.)

When counsel for the Estate suggested, "since [Marquez is] taking a writ," this court "may want to see the records," the trial court responded: "I don't think they need to see the records at this point. *I made it very clear as to what's there and what's going to be released and what's not going to be released. Treatment records, progress records, group therapy records, any of those records are not being released. The only thing I am releasing is the initial intake information that was provided to Mr. Smith, period. That's*

it. Primarily his drinking history. That's all. . . . [P]robably about six or seven pages." (Italics added.)

Marquez then filed his petition for writ of mandate requesting that we vacate the trial court's order. We stayed enforcement of the order and issued an order to show cause.

DISCUSSION

Marquez argues the trial court erred in ordering disclosure of his intake information and ordering the deposition of the case worker with whom Marquez initially spoke because the psychotherapist-patient privilege precludes disclosure of such records as explained in *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083 (*San Diego Trolley*), and federal confidentiality laws and regulations, including 42 C.F.R. 2.64 similarly preclude these disclosures.[7] We agree.

Preliminarily, we note it is somewhat disingenuous for the Estate to argue for the first time there is no evidence of the preliminary fact that Marquez was a "patient" (Evid. Code, § 1011), or that he ever saw a "psychotherapist" (Evid. Code, §1010) within the meaning of the Evidence Code, when its own subpoena demanded Marquez's "psychiatric" records from the Betty Ford Center. Moreover, the Estate's own informal response to Marquez's writ petition directs us to the Betty Ford Center's web site ("See http://www.bettyfordcenter.org/golftournament/sponsorship-guide.pdf") which states that the Betty Ford Center, a "501(c)(3)" facility and the "only Licensed Addiction Treatment Hospital in the State of California," provides "individualized inpatient and outpatient treatment programs customized for each patient by an *interdisciplinary team* of professionals, including a physician, nurse, activity therapist, dietician, spiritual care

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[7] We granted the application of the American Psychological Association (APA) and California Psychological Association (CPA) for leave to file their amici curie brief in support of Marquez's writ petition.

counselor, *psychologist*, counselors and other key clinical team members."[8] (Italics added.)

As explained at length in *San Diego Trolley, supra,* 87 Cal.App.4th 1083 (and as reiterated by the APA and CPA), "Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life . . . . Unless a patient . . . is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depends." (*Id.* at p. 1090, citation omitted.) The purpose of the privilege is "to protect the patient's 'right to privacy and promote the psychotherapeutic relationship.'" (*Id.* at p. 1091, quoting *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 448.) "The relatively high importance of protecting psychotherapeutic confidentiality can be seen in the fact that, unlike the physician-patient privilege, the psychotherapist-patient privilege is *not* subject to a good cause exception in personal injury actions." (*San Diego Trolley, supra,* 87 Cal.App.4th at p. 1091, emphasis added, citation omitted.) Instead, the Evidence Code enumerates twelve exceptions to this privilege.

This privilege is to be "broadly construed in favor of the patient," (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511), and an exception applies "only when the patient's case falls squarely within its ambit." (*Id.* at p. 513; and see *Manela v. Superior Court*

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[8] The Estate also argues for the first time the Betty Ford Center is not "federally assisted" and therefore the federal regulations addressed in the trial court do not apply. However, when Marquez requests judicial notice of the same web site in connection with its authority that the Center's "501(c)(3)" status supports the conclusion that it is "federally assisted" for purposes of the federal confidentiality laws and regulations governing alcohol and drug treatment programs (see 42 C.F.R. 2.11, 2.12; see also *Newcomer v. Am. Home Assur. Co.* (La.App.2005) 921 So.2d 1012, 1013-1014 ["The federal substance abuse privilege is very broad in scope" and specifically includes "'information on referral or intake'" (see 42 C.F.R. 2.12(e)(1); for purposes of this privilege, a "federally assisted" program includes a nonprofit entity that is assisted by the Internal Revenue Service through the allowance of income tax deductions for contributions or qualifies for federal tax-exempt status under section 501(c)(3) of the Internal Revenue Code (see 42 C.F.R. 2.12(b)(4)))]), the Estate objects to this reference by Marquez despite its own citation to the same web site.

(2009) 177 Cal.App.4th 1139, 1146 [To the extent privilege applies, it bars discovery of even relevant information].) The privilege "does include virtually every licensed classification of 'therapist.'" (*People v. Gomez* (1982) 134 Cal.App.3d 874, 880.) A "confidential communication between patient and psychotherapist" means information "transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, *or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted* . . . ." (Evid. Code, § 1012, italics added.)

Moreover, "Notwithstanding waiver of a statutory privilege, a patient retains the more general right to privacy protected by the state and federal Constitutions." (*San Diego Trolley, supra,* 87 Cal.App.4th at p. 1092.) "[N]otwithstanding a waiver, any disclosure of confidential or private information must be supported by a showing of compelling need and accomplished in a manner which protects, insofar as is practical, the patient's privacy." (*Id.* at p. 1093.) Even assuming waiver of the privilege, the Constitution requires the party seeking otherwise private information "to demonstrate a compelling need for access to [such] information." (*Id.* at p. 1095.) To do so, "a litigant must demonstrate not only the information is material to disposition of the litigant's rights but also that there is no other less intrusive means of obtaining the needed information." (*Ibid.*, citations omitted.) The Estate failed to meet this standard and, as a result, could not satisfy the "good cause" showing necessary for disclosure of substance abuse treatment records under either state or federal law. As summarized above, the record contains considerable evidence that the Estate had already obtained or had available other means to obtain the information it sought without sacrificing the confidentiality of Marquez's treatment records.

DISPOSITION

The petition for a writ of mandate is granted. The trial court is directed to vacate its January 27, 2010, order denying Marquez's motions to quash the deposition subpoena for business records and deposition of the person most qualified served on the Betty Ford Center and to issue a new order granting these motions. Marquez is entitled to his costs.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.